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In the Supreme Court of the United States

OCTOBER TERM, 1995

JOHNNY LYNN OLD CHIEF, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the district court properly exercised its discretion, in a prosecution under 18 U.S.C. 922(g)(1) for possession of a firearm by a convicted felon, to admit evidence that petitioner was previously convicted of the felony of assault resulting in serious bodily injury when petitioner offered to stipulate to the existence of his prior felony.

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 49-59) is unpublished, but the judgment is noted at 56 F.3d 75 (Table).

JURISDICTION

The judgment of the court of appeals was entered on May 31, 1995. A petition for rehearing was denied on August 2, 1995. J.A. 60. The petition for a writ of certiorari was filed on October 30, 1995, and was granted on February 20, 1996 (J.A. 68). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES AND RULES INVOLVED

Federal Rules of Evidence 401, 402, 403 and 404(b), and 18 U.S.C. 921(a)(20) and 922(g)(1) are reprinted in the appendix to this brief.

STATEMENT

After a jury trial in the United States District Court for the District of Montana, petitioner was convicted of possession of a firearm after having been convicted of a crime punishable by imprisonment for a term exceeding one year, in violation of 18 U.S.C. 922(g)(1); using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c); and assault with a dangerous weapon, in violation of 18 U.S.C. 1153 and 113(c) (1988). He was sentenced to 120 months' imprisonment on the Section 922(g)(1) charge, a concurrent 60-month prison term on the assault with a dangerous weapon charge, and a consecutive 60-month prison term on the using or carrying a firearm charge, to be followed by a three-year period of supervised release. J.A. 46-47. The court of appeals affirmed the convictions, but vacated petitioner's sentence and remanded for resentencing. J.A. 49-59.

1. On October 23, 1993, petitioner, Stephanie Spotted Eagle, and Stacy Everybody Talks About traveled in a pickup truck to several locations within the Blackfoot Indian Reservation. Petitioner, who had previously been convicted of assault resulting in serious bodily injury, had obtained a 9mm semi-automatic pistol. The group drove to a baseball field where petitioner helped Spotted Eagle fire the pistol into the air. The group then drove to a liquor store to purchase beer. Tr. 76-88.

Anthony Calf Looking and a friend were outside the liquor store. Calf Looking provoked a fight with petitioner and knocked him to the ground. Petitioner produced the pistol and fired at Calf Looking, who fled. Petitioner and his friends returned to their truck and left. Tr. 92-95.

Several moments later, petitioner stopped at an abandoned gas station where he met two other men. Petitioner fired at least one shot from the pistol at the gas station. Police officers arrived, arrested petitioner, and took him into custody. The police found the pistol in the pickup truck. At the police station, the police seized several rounds of 9mm ammunition and a spent 9mm casing from petitioner's pocket. Tr. 190.

2. a. Petitioner was charged in a three-count indictment with violations of 18 U.S.C. 922(g)(1), 924(c), 1153 and 113(c) (1988). J.A. 3-4. The Section 922(g)(1) count of the indictment alleged that, in 1993, petitioner possessed a semi-automatic pistol after having been convicted in 1989 of assault resulting in serious bodily injury, in violation of 18 U.S.C. 1153 and 113(f) (1988) (a crime punishable by more than one year's imprisonment). J.A. 3-4.

Petitioner filed a pre-trial motion *in limine* seeking to bar the government from informing the jury of his prior conviction, except to state that petitioner had been convicted of a crime punishable by imprisonment exceeding one year. Petitioner contended that disclosure of the identity of his prior felony conviction would unfairly prejudice the jury against him within the meaning of Federal Rule of Evidence 403, particularly with regard to the Section 924(c) and assault counts of the indictment. J.A. 7. Petitioner offered to stipulate that he had been

convicted of a felony, and he proposed that the jury be instructed that he "has been convicted of a crime punishable by imprisonment for a term exceeding one year." J.A. 11.¹

The government opposed the motion and, relying on circuit precedent, declined petitioner's offer to stipulate. J.A. 12-13 (citing, *e.g.*, *United States v. Campbell*, 774 F.2d 354 (9th Cir. 1985)). At a pre-trial hearing, the district court denied petitioner's motion *in limine*. J.A. 16.

During voir dire, counsel for the government read the indictment, which identified petitioner's prior conviction as assault resulting in serious bodily injury. Tr. 25; J.A. 4. Later in the voir dire, petitioner's counsel advised the venire that petitioner had been convicted of assault resulting in serious bodily injury, and inquired whether the venire members could "keep an open mind and not just convict [petitioner]" based on his prior conviction. Tr. 40-41.²

¹ The proposed jury instruction provided:

The phrase "crime punishable by imprisonment for a term exceeding one year" generally means a crime which is a felony. The phrase does not include any state offense classified by the laws of that state as a misdemeanor and punishable for a term of imprisonment of two years or less and certain crimes concerning the regulation of business practices.

In [*sic*] hereby instruct you that Defendant JOHNNY LYNN OLD CHIEF has been convicted of a crime punishable by imprisonment for a term exceeding one year.

Defendant's Proposed Instruction No. 7 (J.A. 11).

² The voir dire transcript does not indicate that any member of the venire responded to petitioner's counsel's inquiry. Tr. 41.

b. At trial, the government introduced into evidence a certified copy of the judgment and commitment order reflecting petitioner's prior conviction. J.A. 21. The order indicated the offense of which petitioner had been convicted and the sentence that petitioner received. J.A. 18-19. Petitioner objected to the introduction of the judgment and commitment order "based on the motion in limine [that he] filed prior to trial." J.A. 21. The court overruled the objection. *Ibid.*³

During its instructions to the jury, the district court referred to the prior conviction in its summary of the Section 922(g)(1) count of the indictment. It also instructed the jury that it could find petitioner guilty only if it found that he had previously been convicted of an offense punishable by imprisonment for more than one year, and that the offense of assault resulting in serious bodily injury was such an offense. Tr. 318-320.

The court instructed the jurors that they had heard evidence of petitioner's other acts, but that they could consider that evidence "only as it bears on the defendant's knowledge and intent and for no other purpose." Tr. 317. It further instructed the jurors that they could consider evidence of petitioner's prior conviction only as it affected petitioner's believability as a witness, and that "you may not consider a prior conviction as evidence of guilt of the crime for which the defendant is now on trial." *Ibid.*

³ Counsel for the government also mentioned petitioner's prior offense during his opening and closing statements to the jury. Tr. 52, 282. Petitioner did not make a contemporaneous objection on either of those occasions.

After that charge, petitioner's counsel noted that petitioner had not testified in the case. Tr. 333.⁴ The district court agreed to delete the language relating to the defendant's believability as a witness before submitting the final written instructions to the jury. Petitioner did not object to the court's corrective action. Tr. 335.⁵ The jury found petitioner guilty on all three counts.

3. On appeal, petitioner contended that the introduction and admission into evidence of his prior assault conviction violated Rule 403 of the Federal Rules of Evidence, in light of his offer to stipulate to the existence of the prior felony conviction. Pet. C.A. Br. 9.⁶ The court of appeals affirmed the convictions, but vacated petitioner's sentence.⁷

⁴ Petitioner had previously requested that the court instruct the jury as to the relevance of the prior conviction to petitioner's state of mind and credibility as a witness. See Pet. Proposed Jury Instructions Nos. 3 and 5.

⁵ Petitioner renewed his motion *in limine* and again referred the court to his proposed jury instruction. Tr. 334. The court denied the motion and did not give the proposed instruction.

⁶ Petitioner also appealed his convictions on the grounds that (1) the district court erred in failing to order the government to conduct a fingerprint comparison of a latent fingerprint found on the firearm; (2) the evidence was insufficient to support the convictions on the assault and using or carrying a firearm counts; (3) the district court failed to conduct a post-verdict voir dire; and (4) the district court improperly imposed a 57-month upward departure from petitioner's sentence under the Sentencing Guidelines. Pet. C.A. Br. 2. Those claims are not before this Court.

⁷ On remand, the district court imposed the same 180-month sentence. J.A. 61-67. Petitioner's appeal of that sentence is currently pending in the court of appeals.

The court of appeals reviewed for abuse of discretion the district court's decision to admit petitioner's prior judgment and commitment order to establish the prior-conviction element of the Section 922(g) offense. The court observed that "[r]egardless of the defendant's offer to stipulate, the government is entitled to prove a prior felony offense through introduction of probative evidence." J.A. 50-51. In this case, the court held that the district court did not abuse its discretion in admitting the judgment. J.A. 51.

SUMMARY OF ARGUMENT

I. Prior conviction of a crime punishable by imprisonment for a term exceeding one year is an essential element of the offense created by Section 922(g). Because petitioner's prior judgment and commitment order conclusively established that element, it was unquestionably relevant to his guilt. Petitioner's argument that the "nature" of his prior felony was not "inherently" relevant to the prior-conviction element of Section 922(g) (Pet. Br. 16) misconceives the operation of the Federal Rules of Evidence. Relevancy under Rule 401 pertains to particular items of evidence, not to abstract concepts such as the "nature" of a prior offense. The evidence here was relevant because it showed that petitioner had been convicted of a crime covered by Section 922(g). The firearms disability under Section 922(g) does not apply to all prior convictions. Rather, it excludes certain business crimes and state misdemeanors punishable by less than two years' imprisonment. The fact that Section 922(g) applies to many different predicate crimes does not render irrelevant proof that petitioner was convicted of a particular covered crime.

Nor does a party's offer to stipulate to a material fact render actual evidence of that fact irrelevant. So long as the proffered evidence has a "tendency to make the existence of [a material fact] more probable * * * than it would be without the evidence," Fed. R. Evid. 401, it may not be excluded on grounds of irrelevance. Petitioner's prior judgment of conviction clearly satisfies that test.

II. Federal Rule of Evidence 403 affords the district courts broad discretion in weighing the probative value of evidence against the danger of unfair prejudice raised by that evidence. *United States v. Abel*, 469 U.S. 45, 54 (1984). The district court in this case did not abuse that considerable discretion in admitting petitioner's prior judgment of conviction. Because conviction of a prior offense is an element of Section 922(g), every jury that hears a Section 922(g) case will necessarily be made aware that the accused is a convicted offender. In so defining the Section 922(g) offense, Congress definitively struck the Rule 403 balance in favor of the admission of proof of a defendant's prior conviction. As a consequence, the relevant inquiry in a Section 922(g) case in which the defendant offers to stipulate to the existence of a prior felony is whether the additional potential for unfair prejudice posed by extrinsic evidence of the prior offense substantially outweighs the probative value of that evidence. The structure and legislative history of Section 922(g) indicate that Congress contemplated that specific evidence of a defendant's prior conviction would ordinarily be admitted.

The district court's decision to admit the judgment of conviction was properly informed by the traditional presumption that the government may not be compelled to accept a defendant's stipulation to the exis-

tence of an element of the charged offense in lieu of introducing evidence on that element. The rule that petitioner proposes—under which the government would be obligated to accept a defense offer to stipulate in virtually every Section 922(g) prosecution—would turn the traditional rule on its head. Moreover, the premise of petitioner's rule is that a stipulation is an adequate replacement for actual proof. Acceptance of that broad premise could allow criminal defendants to stipulate away all but the most hotly contested aspect of the charged offense. Such a practice, however, would limit the jury's role to resolving abstract, isolated factual questions, and would fundamentally impair the effectiveness of the prosecution's case in a wide variety of contexts.

The district court's decision here that the probative weight of the judgment of conviction tipped the balance in favor of admission was not an abuse of discretion. Because petitioner's proposed jury instruction would not have required the jury to treat the prior-conviction element as established, his stipulation could not substitute for probative evidence in the Rule 403 balancing analysis. In addition, the incremental risk of prejudice posed by the judgment of conviction was minimal. Although the prior offense was similar to two of the charged offenses, the government's proffer was non-inflammatory and did not reveal the facts underlying the prior offense. Nor was petitioner's prior offense a heinous or infamous crime likely to evoke an emotional response from the jury. When balanced against the prior judgment's overwhelming probative value on an essential element of the charged offense and the availability of petitioner's requested limiting instructions, the incre-

mental danger of prejudice did not require exclusion of the challenged evidence.

ARGUMENT

I. THE PRIOR JUDGMENT OF CONVICTION WAS RELEVANT TO ESTABLISH PETITIONER'S GUILT UNDER 18 U.S.C. 922(g)(1)

Section 922(g)(1) of Title 18 makes it unlawful for a person "who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year * * * to * * * possess in or affecting commerce, any firearm." Section 921(a)(20) of Title 18 provides, in pertinent part, that "[t]he term 'crime punishable by imprisonment for a term exceeding one year' does not include * * * any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or * * * any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less." In order to establish a violation of Section 922(g)(1), it is therefore necessary for the government to establish, as an essential element of the offense, the defendant's conviction of a qualifying prior crime. In order to establish that a prior conviction qualifies under Sections 922(g)(1) and 921(a)(20), the government must establish not only the length of the authorized sentence, but also certain aspects of the "nature" of the prior offense. In this case, the government established the prior-conviction element through introduction of the judgment and commitment order that reflected petitioner's conviction of a qualifying offense. That evidence consti-

tuted "relevant evidence" within the meaning of the Federal Rules of Evidence.

1. Rule 401 of the Federal Rules of Evidence provides that "[r]elevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Because the judgment and commitment order conclusively established that petitioner had previously been convicted of a qualifying offense—an essential element of Section 922(g)—it was unquestionably relevant to prove his guilt. The judgment and commitment order showed not only that petitioner had a prior conviction, but also that it was for an offense covered by Section 922(g). Section 922(g)'s prohibition is applicable not to all "crime[s] punishable by more than one year's imprisonment," but only to crimes that are not excluded from the definition of that phrase in 18 U.S.C. 921(a)(20). See pp. 16-20, *infra*. The information about the nature of petitioner's prior offense was thus relevant to show that he was previously convicted of a covered crime. See *United States v. Breitkreutz*, 8 F.3d 688, 691 n.4 (9th Cir. 1993) ("[W]hile the underlying facts of the felony may not be relevant, the conviction judgment or other proof—which may state the nature of the conviction—most certainly is.").

Petitioner contends (Pet. Br. 16) that "[t]he nature of the prior felony conviction is not 'inherently' relevant to the prior felony conviction element of [Section] 922(g)(1)." That claim misconceives the concept of relevancy. That concept applies to the relation between particular items of evidence and issues to be proved, not to abstract concepts or ideas such as the "nature" of an offense. As the Advisory

Committee's Note to Rule 401 makes clear, "[r]elevance is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case." Here, the judgment and commitment order, including its identification of petitioner's prior offense, was relevant to an issue to be proved. While it is true that Section 922(g)(1) applies to a great many prior crimes, it does not apply to all of them. Petitioner's prior conviction of a particular covered offense was, therefore, a fact "of consequence" in the proceeding, and a judgment and commitment order showing such a conviction was documentary evidence that tended to prove that fact.

That a variety of crimes might satisfy the prior-conviction element does not detract from the relevance of the particular conviction used to establish it in petitioner's trial. The same principle is illustrated by the evidence that was admitted to prove another element of the Section 922(g) offense at petitioner's trial—possession of a "firearm." Petitioner committed the charged offenses by possessing a 9mm semi-automatic pistol. Although the identity of that particular firearm is not a specific element of the Section 922(g) offense, there is no doubt that evidence of the handgun itself was highly relevant to establish petitioner's violation of Section 922(g).

Similarly, where a defendant is charged with possession of a controlled substance, the jury is typically instructed as a matter of law that a named substance (e.g., cocaine or methamphetamine) is a controlled substance under the pertinent criminal statute. The jury must then determine whether the government proved beyond a reasonable doubt that the defendant in fact possessed that named substance. Evidence

that reveals the identity of the particular substance allegedly possessed by the defendant is unquestionably relevant to that determination.

2. A party's offer to stipulate to a particular fact does not make other evidence offered to prove that fact irrelevant. To the contrary, it is well established that evidence may be relevant even if the underlying fact is not contested. "[T]he prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense." *Estelle v. McGuire*, 502 U.S. 62, 69 (1991). As the Advisory Committee's Note to Rule 401 explains:

The fact to which the evidence is directed need not be in dispute. While situations will arise which call for the exclusion of evidence offered to prove a point conceded by the opponent, the ruling should be made on the basis of such considerations as waste of time and undue prejudice (see Rule 403), rather than under any general requirement that evidence is admissible only if directed to matters in dispute. * * * A rule limiting admissibility to evidence directed to a controversial point would invite the exclusion of this helpful evidence, or at least the raising of endless questions over its admission.

Accordingly, whether or not petitioner was prepared to concede that he had previously been convicted of a qualifying crime, evidence that established that point remained "relevant evidence" within the meaning of Rule 401.

3. Contrary to petitioner's suggestion (Pet. Br. 7, 20), the fact that evidence of his prior conviction would have been inadmissible if offered "to prove [his]

character * * * in order to show action in conformity therewith," Fed. R. Evid. 404(b), does not deprive that evidence of its relevance to prove an element of the charged offense. Rule 404(b) "generally prohibits the introduction of evidence of extrinsic acts that might adversely reflect on the actor's character, unless that evidence bears upon a relevant issue in the case." *Huddleston v. United States*, 485 U.S. 681, 685 (1988). The Rule makes clear that other crimes evidence may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Where, as here, a prior conviction is an element of the charged offense, its admission is not barred by Rule 404(b). And, as this Court has observed, "there is no rule of evidence which provides that testimony admissible for one purpose and inadmissible for another purpose is thereby rendered inadmissible; quite the contrary is the case." *United States v. Abel*, 469 U.S. 45, 56 (1984).

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION UNDER FEDERAL RULE OF EVIDENCE 403 IN ADMITTING THE PRIOR JUDGMENT OF CONVICTION

Federal Rule of Evidence 403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." That provision affords the district courts "wide discretion" in deciding whether to admit or exclude evidence. *United States v. Abel*, 469 U.S. at 54. The "broad contours" of Rule 403 are not well suited to categorical legal judgments, *United States v. Layton*, 767 F.2d 549, 554 (9th Cir. 1985), and the trial court is typically "in a better position to evalu-

ate all the circumstances" pertinent to the Rule 403 balancing analysis than is an appellate court, *United States v. Birney*, 686 F.2d 102, 106-107 (2d Cir. 1982). See also 1 C. Mueller & L. Kirkpatrick, *Federal Evidence* § 93, at 473-477 (2d ed. 1994); 1 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 401[01], at 401-10 (1995). Accordingly, "[t]he usual approach on the question of admissibility on appeal is to view both probative force and prejudice most favorably towards the proponent, that is to say, to give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value." 1 Weinstein & Berger, *supra*, ¶ 403[03], at 403-49 to 403-51 (citing, e.g., *United States v. Brady*, 595 F.2d 359, 361 (6th Cir.), cert. denied, 444 U.S. 862 (1979)). See also Weinstein & Berger, *supra*, ¶ 403[03], at 403-51 (noting that the "thrust" of the Federal Rules of Evidence favors admissibility). The trial court's decision should not be overturned unless it "did not fall within the ambit of reasonable debate." *United States v. Currier*, 821 F.2d 52, 55 (1st Cir. 1987).

In light of that deferential standard of review, the admission of the judgment and commitment order showing petitioner's prior conviction as part of the government's case should be upheld. First, the structure and history of Section 922(g) indicate that documentary or testimonial evidence establishing the existence of a prior, covered conviction will normally be a feature of the prosecution's case. Second, a defendant's offer to stipulate to an element of an offense is one factor under Rule 403; it does not automatically require the court to exclude more vivid forms of proof. Finally, on the facts of this case, the district court's admission of the prior-conviction evidence was not an abuse of discretion.

A. The Structure And Legislative History Of Section 922(g) Support Admission Of Evidence Of The Particular Offense Of Which The Defendant Was Convicted

Conviction of a prior offense is an element of Section 922(g) that the government must prove beyond a reasonable doubt. Accordingly, every jury that hears a Section 922(g) case will necessarily learn that the accused is a convicted offender. In defining the offense so as to require proof of a prior conviction, Congress thus necessarily intended that proof of a defendant's prior conviction would come before the jury and that it may not be excluded as unfairly prejudicial under Rule 403.⁸ See, e.g., *United States v. Driggs*, 823 F.2d 52, 54-55 (3d Cir. 1987) (exclusion of evidence is abuse of discretion where evidence is necessary to prove an essential element of the offense); 1 Weinstein & Berger, *supra*, ¶ 401[01], at 401-18 ("Whether or not a fact is of consequence is determined not by the rules of evidence but by substantive law.").

The question before the district court in a prosecution under Section 922(g), therefore, is whether the additional danger of prejudice posed by disclosure of the identity of the defendant's prior crime substantially outweighs the probative value of that evidence. The structure and development of Section 922(g) strongly support the conclusion that actual evidence of a defendant's prior conviction should not ordinarily be excluded based on that incremental danger of

⁸ Petitioner concedes (Pet. Br. 21 n.7), as he must, that, because Congress made a prior conviction an element of the Section 922(g) offense, "the jury must be told that the accused is a convicted felon in order for [the] offense to be proven."

prejudice. Just as Congress intended that juries be made aware of a Section 922(g) defendant's status as a convicted felon, Congress necessarily contemplated that juries would ordinarily learn the identity of the defendant's prior offense.

Section 922(g)(1) criminalizes firearm possession by "any person * * * who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year." As Congress well knew, a crime is not an abstract or metaphysical concept; it is "an act or the commission of an act that is forbidden or the omission of a duty that is commanded by a public law." *Webster's Third New International Dictionary* 536 (1986). A prior conviction therefore connotes not only felon status, but specific past conduct. Accordingly, just as a Section 922(g) prosecution will involve evidence that a defendant possessed a *particular* firearm, Congress undoubtedly understood that evidence of a *particular* prior offense would typically be introduced to prove that element.⁹

In enacting Section 922(g) and its predecessor provisions, Congress focused considerable attention on the types of prior offenses that would trigger Section 922(g)'s coverage. Section 922(g) had its genesis in the Federal Firearms Act, ch. 850, § 2, 52 Stat. 1251

⁹ That conclusion is bolstered by the traditional presumption, discussed at pages 21-28, *infra*, against imposing mandatory stipulations on the government in lieu of permitting actual proof. It is exceedingly unlikely that, in enacting Section 922(g), Congress contemplated a rule that the United States would be required to stipulate away an element of the offense whenever the defendant believed that such a course would benefit him. To the contrary, Congress almost certainly assumed that physical evidence conveying both the fact and the identity of a defendant's prior offense would typically be introduced.

(1938) (formerly codified at 15 U.S.C. 902(f) (1964)), which made it "unlawful for any person who has been convicted of a crime punishable by imprisonment for a term exceeding one year * * * to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

In 1968, Congress enacted the Gun Control Act, Pub. L. No. 90-618, 82 Stat. 1213 (codified at 18 U.S.C. 921 *et seq.*), and the Omnibus Crime Control and Safe Streets Act, Pub. L. No. 90-351, Tit. VII, 82 Stat. 236-237 (formerly codified at 18 U.S.C. App. 1201 *et seq.* (1970)). The 1968 enactments recodified the possession and receipt provision of former 15 U.S.C. 902(f) (1964) into 18 U.S.C. App. 1202(a) (1982), which criminalized firearm possession by "[a]ny person who * * * has been convicted by a [federal, state, or local court] of a felony," and 18 U.S.C. 922(h) (1982), which prohibited the receipt of firearms by a person "who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year." At the same time, Congress chose to exclude certain "commercial-type crimes" from the definition of "crime[s] punishable by imprisonment for a term exceeding one year." S. Rep. No. 1097, 90th Cong., 2d Sess. 112-113 (1968). As originally enacted, Section 921(a)(20) provided:

The term "crime punishable by imprisonment for a term exceeding one year" shall not include (A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices as the Secretary may by regulation designate, or (B) any State

offense (other than one involving a firearm or explosive) classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

18 U.S.C. 921(a)(20) (1970).

In 1986, as part of the Firearms Owners' Protection Act (FOPA), Congress consolidated the possession provisions into the present Section 922(g), and it again redefined the prior offenses that fall within that prohibition. Section 921(a)(20) now provides:

The term "crime punishable by imprisonment for a term exceeding one year" does not include—

(A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or

(B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the

person may not ship, transport, possess, or receive firearms.

18 U.S.C. 921(a)(20).¹⁰

As its evolution indicates, Section 922(g) does not merely criminalize firearm possession by "felons."¹¹ Rather, it disables convicted offenders from subsequently possessing or transferring firearms, based on the characteristics of their prior offenses. Thus, not only the fact, but the identity of a defendant's prior offense is critical to the operation of Section 922(g). In light of the structure and history of Section 922(g), Congress necessarily contemplated that jurors would ordinarily receive substantive evidence of the defendant's prior offense.¹²

¹⁰ The FOPA altered the prior-conviction definition in four respects: (1) it made the courts, rather than the Treasury Secretary, the final arbiter as to what constitutes a "similar offense relating to the regulation of business practices"; (2) it excluded state firearms misdemeanors punishable by two years' imprisonment or less; (3) it added the requirement that a "conviction" be determined in accordance with the law of the jurisdiction in which the underlying proceeding was held; and (4) it generally excluded any convictions for which the defendant received a pardon, civil rights restoration, or expungement of the record. See S. Rep. No. 583, 98th Cong., 2d Sess. 7 (1984).

¹¹ Section 922(g) reaches certain defendants who were previously convicted of misdemeanors, 18 U.S.C. 921(a)(20)(B), and it exempts from its coverage defendants who were previously convicted of certain felonies, 18 U.S.C. 921(a)(20)(A).

¹² Whether a particular conviction qualifies under Section 921(a)(20) is a question of law. See *United States v. Flower*, 29 F.3d 530, 532 (10th Cir. 1994) ("Whether a prior conviction meets the definition of [Section] 921(a)(20), and is therefore properly admitted in a [Section] 922(g)(1) case, is an ultimate legal determination to be decided by the trial judge."). Juries

B. The United States May Not Ordinarily Be Compelled To Accept A Defendant's Stipulation To The Existence Of An Element Of The Charged Offense In Lieu Of Introducing Evidence

This Court has never addressed the issue of whether a defendant's offer to stipulate to an element of an offense may justify precluding the admission of actual evidence to establish that element.¹³ "[T]he weight of authority," however, "is that the criminal accused cannot 'plead out' an element of the charged offense by offering to stipulate to that element." E. Imwinkelried, *The Right to "Plead Out" Issues and Block the Admission of Prejudicial Evidence: The Differential Treatment of Civil Litigants and the*

in Section 922(g)(1) cases are typically instructed that a particular crime falls within the statutory prohibition, and that they must decide, based on the evidence, whether the defendant was previously convicted of that crime. See, e.g., 1A L. Sand, et al., *Modern Federal Jury Instructions* ¶ 35.07[2], at 35-87 (1995) ("The government contends that the defendant was convicted of [insert crime] in state (or federal) court. I charge you that as a matter of law, [insert crime] is a crime punishable by imprisonment for a term exceeding one year. However, it is for you to determine beyond a reasonable doubt if the defendant was convicted of this crime.") (brackets in original).

¹³ In 1992, the Court granted the petition for a writ of certiorari in *Hadley v. United States*, No. 91-6646. 503 U.S. 905. Among the questions presented by the petition in *Hadley* was: "Should the accused citizen be allowed to stipulate that the requisite 'intent' exists in a criminal case in order to remove a technical issue of 'intent' as a disputed issue at trial when the accused citizen's sole defense at trial is that he or she did not commit the acts charged in the indictment?" Petition for a Writ of Certiorari at i, *Hadley v. United States*, No. 91-6646. After briefing and oral argument, the Court dismissed the writ of certiorari as improvidently granted. 506 U.S. 19 (1992).

Criminal Accused as a Denial of Equal Protection, 40 Emory L.J. 341, 357-358 (1991). See also C. Wright & K. Graham, *Federal Practice and Procedure* § 5194, at 198-199 (1978) (collecting cases).¹⁴ That rule has added force where, as here, the evidence that the government seeks to introduce constitutes, by itself, an element of the offense. See, e.g., *United States v. Gantzer*, 810 F.2d 349, 351 (2d Cir. 1987); *United States v. Campbell*, 774 F.2d 354, 356 (9th Cir. 1985); *Parr v. United States*, 255 F.2d 86, 88 (5th Cir.), cert. denied, 358 U.S. 824 (1958). Because the defen-

¹⁴ A strong presumption against mandatory imposition of defense stipulations was also the majority rule before the adoption of the Federal Rules of Evidence. In a seminal case, *Parr v. United States*, 255 F.2d 86, 88, cert. denied, 358 U.S. 824 (1958), the Fifth Circuit stated:

It is a general rule that "A party is not required to accept a judicial admission of his adversary, but may insist on proving the fact." 31 C.J.S. Evidence § 299, p. 1068. The reason for the rule is to permit a party "to present to the jury a picture of the events relied upon. To substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight." *Dunning v. Maine Central Railroad Co.*, 91 Me. 87, 39 A. 352, 356, 64 Am.St.Rep. 208. Such a rule, we think, should apply in a case such as this where the [items] offered in evidence are of the gist of the offense charged rather than descriptive or illustrative of a scene or an occurrence.

See also *United States v. Mishkin*, 317 F.2d 634, 638 (2d Cir.) (citing *Parr*), cert. denied, 375 U.S. 827 (1963); *United States v. Brickey*, 426 F.2d 680, 686 (8th Cir.) (same), cert. denied, 400 U.S. 828 (1970); *Alire v. United States*, 313 F.2d 31, 34 (10th Cir. 1962) (same), cert. denied, 373 U.S. 943 (1963); but see *United States v. Grassi*, 602 F.2d 1192, 1196 (5th Cir. 1979) (*Parr* rule "is not a blanket prohibition against compelling the government to accept a defendant's stipulation"), vacated on other grounds, 448 U.S. 902 (1980).

dant's tactical decision not to contest an element of a crime does not relieve the prosecution of the burden of proving it, *Estelle v. McGuire*, 502 U.S. at 69, the government should rarely be required to accept a defendant's offer to stipulate in lieu of putting on its proof.

1. The rule that petitioner proposes—requiring the government to accept a defendant's offer to stipulate to his prior conviction in virtually every prosecution under Section 922(g) (Pet. Br. 32-39)—would turn the traditional rule on its head. It would replace the broad freedom of the district court to balance the probative value of evidence against its prejudicial effect in a particular case with a categorical rule. Such a holding would be a significant departure from the usual workings of Rule 403.

Petitioner's proposal, if accepted, could not easily be limited to the prior-conviction element of Section 922(g)(1). Because, in his view, actual evidence will generally have only incremental probative value when compared with a stipulation, the logic of petitioner's rule would allow criminal defendants to stipulate away all but the most hotly contested aspect of the charged offense, leaving juries to resolve abstract, isolated questions, rather than the defendant's innocence or guilt. See *United States v. Breitkreutz*, 8 F.3d at 692. Such a rule is not required by the Federal Rules of Evidence, and is contrary both to the courts' historical approach to stipulations and to Congress's intent in enacting the framework of firearms control provisions of which Section 922(g) is a part.

Contrary to petitioner's contention (Pet. Br. 39-43), numerous valid reasons exist for the government to decline to enter into a stipulation in a particular case.

It has been recognized that "[a] cold stipulation can deprive [the government] of the legitimate moral force of [its] evidence, and[] can never fully substitute for tangible, physical evidence or the testimony of witnesses." *United States v. Allen*, 798 F.2d 985, 1001 (7th Cir. 1986) (citation and internal quotation marks omitted); accord *United States v. Pedroza*, 750 F.2d 187, 201 (2d Cir. 1984) ("A party is normally permitted to present to the jury a picture of the events relied upon. To substitute for such a picture a naked admission might . . . rob the evidence of much of its fair and legitimate weight.") (internal quotation marks omitted); *United States v. Ellison*, 793 F.2d 942, 949 (8th Cir.), cert. denied, 479 U.S. 937 (1986); 9 J. Wigmore, *Evidence* § 2591, at 589 (3d ed. 1940). Stipulations frequently fail to convey the breadth of information contained in physical evidence or live testimony, and do not facilitate the permissible factual inferences that jurors frequently must make from the evidence presented. Cf. 1 Weinstein & Berger, *supra*, ¶ 402[02], at 402-11 ("A law suit involves numerous propositions which cannot be viewed or proved in isolation."). In addition, defendants' proffered stipulations are frequently incomplete, "conditional or so qualified as to impair the effectiveness of the prosecution's case." Wright & Graham, *supra*, § 5194, at 199 (footnote omitted).

A stipulation is not evidence, but rather an agreement between the parties. See 9 J. Wigmore, *Evidence* § 2588, at 821 (Chadbourn rev. ed. 1981); 2 McCormick *On Evidence* § 254, at 142 (4th ed. 1992). Accordingly, it must normally be accompanied by an instruction to the jury that explains its meaning and effect. A stipulation to an element of a criminal offense presents particular difficulties because its

effect is to relieve the government of its legal duty to prove that element beyond a reasonable doubt. See, e.g., *United States v. Branch*, 46 F.3d 440, 442 (5th Cir. 1995). An instruction concerning the effect of such a stipulation therefore must clearly and unequivocally inform the jury that the government has met its burden of proving that element, while preserving the defendant's right to a presumption of innocence. The potential for juror confusion is high where, because of a stipulation, the government introduces no evidence to prove an essential element of the offense.¹⁵

A stipulation is particularly likely to impair the effectiveness of the government's case when it purports to remove from the jury's consideration a considerable portion of the material issues to be litigated, leaving the jury to resolve a seemingly abstract proposition. For example, the offense of assault resulting in serious bodily injury in violation of 18 U.S.C. 113(a)(6) may be established by proving "a threat to inflict injury upon the person of another which, when

¹⁵ Stipulations may also generate legal issues regarding whether the court improperly invaded the province of the jury. See *United States v. Jones*, 65 F.3d 520, 521, 523-524 (holding that instruction that "[s]ince defendant admits that he was previously convicted of a felony, you will find that the government has established this element of the offense" improperly invaded the role of the jury and required reversal), opinion vacated on grant of rehearing en banc, 73 F.3d 616 (6th Cir. 1995). While we believe that the panel erred in *Jones*, that decision illustrates the potential for claims of error arising out of instructions that seek to give weight and meaning to stipulations. Of course, absent instructions that provide such weight and meaning, juries may be unable to conclude that the stipulation is sufficient to meet the government's burden of proof.

coupled with an apparent present ability, causes a reasonable apprehension of immediate bodily harm." *United States v. Loera*, 923 F.2d 725, 728 (9th Cir.), cert. denied, 502 U.S. 854 (1991). Under petitioner's theory, a defendant could require the government to stipulate to his intent and ability to harm the victim, and to the fact that the victim experienced fear of bodily harm, leaving the jury to hear evidence only on the abstract question whether such fear was reasonable. Because actual evidence tending to show the other elements of the offense could be marginally prejudicial—when compared with a bare stipulation—such evidence would be excluded under petitioner's reading of Rule 403. It is evident, however, that such a construction of Rule 403 would fundamentally impair the effectiveness of the government's case, and lead to substantial jury confusion, in a wide variety of criminal prosecutions.

2. The problems we describe above are fully implicated when the defendant offers to stipulate to the existence of a prior conviction in a Section 922(g) case. As this Court has noted, "there is a long tradition of widespread lawful gun ownership by private individuals in this country." *Staples v. United States*, 114 S. Ct. 1793, 1799 (1994). Accordingly, if the government fails to present affirmative evidence that the defendant was convicted of another offense before the charged possession occurred, the jury "may wonder why [the defendant's] possession was illegal. Doubt as to the criminality of [the defendant's] conduct may influence the jury when it considers the possession element." *United States v. Barker*, 1 F.3d 957, 960 (1993) (quoting *United States v. Collamore*, 868 F.2d 24, 28 (1st Cir. 1989)), modified, 20 F.3d 365 (9th Cir. 1994). As a consequence, especially where the defen-

dant is unwilling to link a proffered stipulation with a definitive jury instruction regarding the jury's proper role, the government should be free to decline the offer to stipulate and to admit actual proof.

It is also frequently the case that evidence of the identity of the defendant's prior conviction will be relevant and admissible for other purposes than to establish the prior-conviction element of the offense. For example, when a defendant testifies at trial, he is subject to impeachment by his prior felony conviction under Federal Rule of Evidence 609. See, e.g., *United States v. Jacobs*, 44 F.3d 1219, 1224 (3d Cir.), cert. denied, 115 S. Ct. 1835 (1995); *United States v. Tracy*, 36 F.3d 187, 191-194 (1st Cir. 1994), cert. denied, 115 S. Ct. 1717 (1995); 3 Mueller & Kirkpatrick, *supra*, § 279, at 272. In other cases, the prior conviction may be relevant under Rule 404 to prove an element of the offense apart from the defendant's status.¹⁶ See, e.g., *United States v. Rubio*, 727 F.2d 786, 797-798 (9th Cir. 1983) (prior drug conviction was relevant to show that the defendant engaged in pattern of drug racketeering activity, and was admissible despite the defendant's offer to stipulate to felon status).

As the Advisory Committee's Note to Rule 403 explains, "[t]he availability of other means of proof may * * * be an appropriate factor" in balancing the probative value of an item of evidence against its potential for unfair prejudice. The Advisory Committee has further recognized that the admission of

¹⁶ Even those circuits that generally require the prosecution to accept a defense stipulation in Section 922(g) cases recognize that such acceptance should not be required where the "other crimes" evidence could be introduced for other purposes in the course of the trial. See, e.g., *United States v. O'Shea*, 724 F.2d 1514, 1516 (11th Cir. 1984).

relevant evidence offered "to prove a point conceded by the opponent * * * should be made on the basis of such considerations as waste of time and undue prejudice (see Rule 403)." Fed. R. Evid. 401 advisory committee's note. Consistent with those principles, where a defendant offers an unconditional stipulation, coupled with an adequate proposed jury charge, the trial court should consider the availability of the stipulation as one of the many factors in the Rule 403 balancing analysis. See, e.g., *United States v. Allen*, 798 F.2d at 1001; *United States v. Grassi*, 602 F.2d 1192, 1195-1197 (5th Cir. 1979), vacated on other grounds, 448 U.S. 902 (1980). That consideration should, of course, be informed by the historical presumption against forced stipulations, and by the particularized concerns of juror confusion and evidentiary effectiveness discussed above.

If, however, either the proposed stipulation or the accompanying proposed jury charge is incomplete or equivocal, the defense's proffer should not be considered in the Rule 403 calculus. That is because an incomplete or inadequate "judicial admission" of an element of the offense cannot substitute for actual evidence of a material fact. See, e.g., *United States v. Pedroza*, 750 F.2d at 201 (although defendant's offer to stipulate that ransom was sought to pay for narcotics "might have lessened the government's need for extensive evidence of the antecedent cocaine transaction," the offered stipulation was an inadequate substitute for actual evidence of the defendant's motive). The government should not be deprived of the opportunity to make its case through the introduction of probative evidence absent procedural assurances that the jury will treat the stipulated matter as proven beyond a reasonable doubt.

C. The District Court Acted Within Its Broad Discretion In Refusing To Impose Petitioner's Proposed Stipulation On The Government And In Admitting The Judgment Of Conviction Into Evidence

The district court in this case correctly declined to impose petitioner's stipulation on the government. Petitioner offered to stipulate to the existence of an essential element of the charged offense. As we have explained, compelling the government to accept a stipulation, and to forgo the admission of actual evidence, is least appropriate when the stipulation would replace all proof of an element of a crime. In addition, although petitioner's proposed stipulation was not conditional, the proposed jury instruction was inadequate. Petitioner's proposed jury instruction (J.A. 11) would not have instructed the jury either that the government should be considered to have proved the prior-conviction element beyond a reasonable doubt, or that, if it found that petitioner had possessed a firearm, it was required to convict him of the Section 922(g)(1) count. See also Pet. Proposed Jury Instruction No. 22 ("[Petitioner's] plea of not guilty puts in issue each of the essential elements of the offenses described in these instructions and imposes on the Government the burden of establishing each of these elements by proof beyond a reasonable doubt."). And, apparently because of Section 921(a)(20)'s focus on offense characteristics, petitioner's Proposed Jury Instruction No. 7 employed a complex and circuitous definition of the prior-conviction element that was highly likely to confuse the jury. See note 1, *supra*; J.A. 11.

Nor did the district court abuse its discretion in holding that the potential unfair prejudice from the

introduction of petitioner's prior judgment of conviction did not substantially outweigh the probative value of that evidence. Here, an incremental risk of prejudice may have arisen because two of the crimes with which petitioner was charged—assault with a dangerous weapon and using or carrying a firearm during a violent crime—had some similarities to the prior offense of assault resulting in serious bodily injury. Admission of evidence of the prior assault conviction presented the potential that the jury might improperly surmise that, having committed an assault in the past, petitioner was more likely to have done so again.¹⁷

The similarity between a prior offense and the crime of which the defendant is presently accused is relevant to the Rule 403 analysis. Such similarity is not dispositive, however. See, e.g., *United States v. Booker*, 706 F.2d 860, 862 (8th Cir.) (admission of evidence conveying identity of prior crime not abuse of discretion, despite similarity between prior crime and charged offense), cert. denied, 464 U.S. 917 (1983). Here, the risk of prejudice was minimal. The evidence of petitioner's prior offense was limited to a certified copy of the judgment and commitment order. J.A. 21. The government's proffer was not inflamma-

¹⁷ That is the general form of inference that Rule 404(b) bars, by preventing the introduction of "other crimes" evidence "to prove the character of a person in order to show action in conformity therewith." See *United States v. Moccia*, 681 F.2d 61, 63 (1st Cir. 1982) (Breyer, J.) (Rule 404(b) "codifies the common law doctrine forbidding the prosecution from asking the jury to infer from the fact that the defendant has committed a bad act in the past, that he has a bad character and therefore is more likely to have committed the bad act now charged").

tory and did not reveal the facts underlying the prior offense. In addition, although petitioner had been convicted of several prior felony offenses, the government introduced evidence of only one prior conviction. Petitioner's prior offense (assault resulting in serious bodily injury) was not a heinous or infamous crime likely to evoke an emotional response from the jury.

The judgment of conviction was introduced as direct evidence of an element of the charged offense, and was clearly the most probative evidence available to demonstrate that element. In addition, the evidence was not cumulative, because it was the only evidence that the government introduced to prove that element of the offense. On balance, while the method by which the prior conviction was introduced "did not prevent *all* prejudice to [petitioner] * * *, [it] did, in our opinion, ensure that the admission of this highly probative evidence did not *unduly* prejudice [petitioner]." *United States v. Abel*, 469 U.S. at 54-55.

Potential prejudice may also be addressed by limiting instructions. Federal Rule of Evidence 105 provides that when evidence is admissible for one purpose but not another, "the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." Here, as in other settings, limiting instructions may protect against the potential for unfair prejudice resulting from the introduction of prior convictions. See *Huddleston v. United States*, 485 U.S. at 691; *Spencer v. Texas*, 385 U.S. 554, 562 (1967). At petitioner's request, the district court in this case gave limiting instructions.¹⁸ The instruc-

¹⁸ The district court initially instructed the jury that it could consider evidence of petitioner's other acts "only as it bears on

tions at issue were largely inapplicable because petitioner did not testify at trial, and because evidence of his prior offense was not introduced under Rule 404. The instructions did not leave the jury free, however, to consider petitioner's prior conviction as evidence of a criminal or violent character. Indeed, the court instructed the jury that it "may not consider a prior conviction as evidence of guilt of the crime for which the defendant is now on trial." Tr. 317. As applicable to the Section 924(c) and assault counts, that charge mitigated the potential prejudice from the introduction of the prior judgment of conviction. See *Shannon v. United States*, 114 S. Ct. 2419, 2427 (1994) ("almost invariable assumption of the law [is] that jurors follow their instructions"). Although the charge did not entirely apply to the Section 922(g)(1) count, it certainly did not suggest an improper basis on which to convict petitioner.¹⁹

the defendant's knowledge and intent and for no other purpose." Tr. 317. The court further instructed the jury that it could consider evidence of petitioner's prior conviction only as it affected petitioner's believability as a witness, and that "you may not consider a prior conviction as evidence of guilt of the crime for which the defendant is now on trial." *Ibid.* Because petitioner did not testify, at petitioner's request, the district court removed the credibility instruction from its final written charge. Tr. 335.

¹⁹ Petitioner now argues (Pet. Br. 40-41) that the district court's limiting instructions were inadequate. But because petitioner himself urged the district court to give them, see Pet. Proposed Jury Instructions Nos. 3 and 5, he is barred by the "invited error" rule from seeking to reverse his conviction based on those same instructions. See, e.g., *United States v. Stauffer*, 38 F.3d 1103, 1109 (9th Cir. 1994); *United States v. Herrera*, 23 F.3d 74, 75 (4th Cir. 1994).

Finally, petitioner argues (Pet. Br. 48) that "the trial judge failed to consider any alternative remedies to stipulation."²⁰ The district court, however, issued its evidentiary ruling in response to petitioner's objection and motion *in limine*. Petitioner's motion proposed to substitute a stipulation and jury instruction for extrinsic evidence of his prior conviction. J.A. 7. He did not move to redact the judgment of conviction. See *United States v. Holland*, 880 F.2d 1091, 1094-1095 (9th Cir. 1989) (defendant's "blanket objection" to the admission of an audiotape "d[id] not preserve an objection to failure to redact the tape"); *Loneragan v. United States*, 95 F.2d 642, 646 (9th Cir. 1938); see also Fed. R. Evid. 103(a)(1) & advisory committee's note (rule requiring articulation of "the specific ground of objection" intended "to alert [the trial judge] to the proper course of action and enable opposing counsel to take proper corrective measures"). Although it was within the district court's discretionary authority to order redaction sua sponte, its failure to do so did not constitute an abuse of discretion.²¹

²⁰ Petitioner also suggests (Pet. Br. 31) the existence of an "unfair spillover effect" of the joinder of the [Section] 922(g)(1) count with the other counts." (Emphasis added); see also *id.* at 8, 24. Petitioner did not seek severance of his offenses before trial pursuant to Federal Rule of Criminal Procedure 14, nor did he seek review of the joinder of his offenses in the court of appeals or in his petition for certiorari. He is therefore precluded from raising that claim at this juncture. See *Lebron v. National R.R. Passenger Corp.*, 115 S. Ct. 961, 965 (1995).

²¹ In a Section 922(g) case in which the district court determines, upon a properly framed objection, that the potential unfair prejudice from particular prior-offense evidence substantially outweighs the probative value of that evidence, the

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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court should permit redaction rather than requiring the government to accept a defendant's stipulation. Cf. *United States v. Tavares*, 21 F.3d 1, 5 (1st Cir. 1994) (en banc) (reversing Section 922(g) conviction based on improper evidence of nature of prior conviction, but noting that "the prosecution ordinarily cannot be forced to accept a stipulation if it prefers to introduce a judgment of conviction properly redacted").

APPENDIX

Federal Rule of Evidence 401 provides:

Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Federal Rule of Evidence 402 provides:

Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Federal Rule of Evidence 403 provides:

Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Federal Rule of Evidence 404(b) provides:

Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

18 U.S.C. 922(g) provides:

It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

* * * * *

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. 921(a)(20) provides:

The term "crime punishable by imprisonment for a term exceeding one year" does not include—

(A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or

(B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.